

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JIM CHARLES HOPKINS

Claimant

VS.

ALLIED WASTE NORTH AMERICA, INC.

Respondent

AND

AMERICAN HOME ASSURANCE CO.

Insurance Carrier

Docket No. 1,026,392

ORDER

Respondent and its insurance carrier requested review of the August 22, 2006, Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

The Administrative Law Judge (ALJ) found that claimant is still unable to return to work without further medical treatment. Accordingly, the ALJ ordered temporary total disability (TTD) compensation resumed beginning July 10, 2006. But the ALJ took under advisement the issue of further medical treatment.

Respondent requests review of whether the ALJ exceeded his jurisdiction in considering a request for TTD benefits based on a premature seven-day demand letter; whether the ALJ erred in awarding TTD benefits without making a ruling on the issue of additional medical treatment; whether the ALJ erred in considering a report of Dr. Edward Prostic because it had been produced less than 24 hours before the preliminary hearing and because it lacked sufficient foundation; and whether the ALJ erred in awarding TTD benefits when the evidence shows claimant has reached maximum medical improvement (MMI).

Claimant contends that Dr. Atul Patel stated that he may benefit from referral to a physician for pain management and Dr. Edward Prostic recommended he have psychological treatment. Claimant further argues that as a medical doctor, Dr. Prostic is competent to opine that he is in need of psychological assistance. Claimant admits that

Dr. Prostic's report was not available until the day before the preliminary hearing. However, claimant asserts that his request for medical treatment was attached to the application for preliminary hearing and corresponded with respondent's Exhibit E to the preliminary hearing, which are the records of Dr. Patel. Accordingly, claimant requests that the ALJ's Preliminary Decision be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant worked for respondent as a mechanic. He injured his left shoulder while working on a brake drum in September 7, 2005. He had surgery to repair that injury and returned to light-duty work on November 8, 2005. Although claimant stated he was restricted from driving a vehicle, on November 8th he was asked by his boss to pick up some truck parts. As claimant drove to the location to pick up the parts, he was involved in an automobile accident and injured his head, neck and back, and reinjured his left shoulder. Because of the accident, his employment at respondent was terminated.

Claimant's left shoulder was treated by Dr. Thomas Samuelson. Dr. Samuelson released him from treatment on March 20, 2006, as being at MMI in regard to the shoulder injury. Dr. Samuelson also indicated that, in regard to claimant's left shoulder, he could return to full work duties. Claimant was treated by Dr. Patel for the injuries from his automobile accident. Dr. Patel released him to return to work with restrictions on April 18, 2006. On May 18, 2006, Dr. Patel found that claimant was at MMI but stated that he was becoming more debilitated and may benefit from pain management.

Claimant was seen by Dr. Prostic on August 4, 2006, at the request of claimant's attorney. Dr. Prostic stated that claimant's "MMPI profile indicates that he has decompensated psychologically. He is unlikely to return to gainful employment until his psychological problem has been addressed."¹ Although Dr. Prostic's report indicated that the MMPI profile was enclosed, no such profile was included as an exhibit. Dr. Prostic's report was apparently not provided to respondent's attorney until August 16, 2006, one day before the preliminary hearing.

Respondent argued that TTD benefits were terminated in April 2006 as a result of Dr. Patel's declaration that claimant was at MMI.

The administrative file reflects that claimant's notice of intent letter dated June 23, 2006 addressed to respondent's counsel requested additional medical treatment for claimant's back. At the preliminary hearing on August 17, 2006, the claimant's counsel

¹ P.H. Trans. (Aug. 17, 2006), Cl. Ex. 1 at 4.

noted that Dr. Prostic's report was obtained the day before and based upon that report claimant requested psychological treatment and temporary total disability compensation.

Respondent's counsel argued the seven-day demand letter neither requested psychiatric treatment nor temporary total disability compensation. Moreover, respondent requested the opportunity to have claimant examined by a psychiatrist.

K.S.A. 44-534a(a)(1) provides:

At least seven days prior to filing an application for a preliminary hearing the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing.

Respondent requested the opportunity to have claimant examined by a psychiatrist in order to present evidence regarding claimant's need for psychological treatment. K.S.A. 44-534a(a)(2) provides:

Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, **no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues.** (Emphasis Added).

Respondent requested the opportunity to present evidence on the issue of claimant's need for psychiatric treatment. Respondent was unaware at the onset of the preliminary hearing that claimant would be asking for TTD or psychiatric medical treatment. The deficiency in the notice of intent letter is significant in that respondent was surprised and prejudiced by the inability to provide the requested evidence on the newly disputed issue of claimant's entitlement to psychological treatment. This justifies keeping the record open in order to give respondent the opportunity to present additional evidence.

Under these unusual facts, this Board Member finds the August 22, 2006 Preliminary Decision should be set aside and this proceeding remanded to the ALJ for further proceedings. It appears neither party was aware of the contents of Dr. Prostic's medical report until the day before the preliminary hearing. Consequently, respondent's

request to obtain and present rebuttal evidence to challenge the doctor's findings should be granted.

In summation, the respondent did not receive the required specific notice of claimant's request for psychological treatment nor was respondent otherwise afforded an opportunity to either present evidence or address the issue of claimant's need for such medical treatment. In this instance, this Board Member finds that respondent has been denied due process of law and, therefore, the ALJ exceeded his jurisdiction and authority in entering the August 22, 2006 Preliminary Decision.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.³

WHEREFORE, it is the finding of this Board Member that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated August 22, 2006, is set aside and the claim is remanded to the ALJ for further proceedings.

IT IS SO ORDERED.

Dated this _____ day of November 2006.

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
William G. Belden, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge

² K.S.A. 44-534a.

³ K.S.A. 2005 Supp. 44-555c(k).